

June 13, 2012

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: Interpretation of the Terms "Multichannel Video Programming Distributor" and
"Channel" as Raised in Pending Program Access Complaint Proceeding
MB Docket No. 12-83

Dear Ms. Dortch:

I am writing on behalf of the Fox Affiliates Association (the 'Fox Affiliates') to urge the Commission to resolve the above-captioned proceeding in a manner that advances the well-established Congressional and FCC policy that parties must obtain a broadcaster's consent before retransmitting a television signal as part of a video programming service offered for sale to consumers. The retransmission consent system established by Section 325 of the Communications Act (the "Act") is critical to the maintenance of America's over-the-air local broadcasting system and the high-quality local service that system provides. Retransmission consent is a Congressional command, and the system works. The Commission's resolution of Sky Angel's unrelated program access complaint should not in any way compromise broadcasters' retransmission consent rights.¹

Other parties to this proceeding have thoroughly analyzed the proper statutory construction of the terms "Multichannel Video Programming Distributor" ("MVPD") and "Channel," and the Fox Affiliates will not repeat these arguments here. However, the Fox Affiliates urge the Commission to avoid a mechanistic interpretation of the statute that misses the key principles Congress sought to implement through enactment of Section 325(b) of the Act. Enacted as part of the 1992 Cable Act, retransmission consent represents Congress's recognition that each individual broadcaster possesses an important and compensable "communications right" in its broadcast signal that is separate from the copyright rights and interests in the programming contained in the signal.² To ensure that non-broadcast multichannel video providers respect that right, Congress required any video service provider seeking to retransmit a broadcast signal to first obtain that broadcaster's consent.³ Congress intended the obligation to

¹ In particular, the Fox Affiliates take no position on whether online video distributors ought to be entitled to the benefits of the program access rules. The Fox Affiliates sole interest in this proceeding is the protection of broadcasters' Congressionally mandated retransmission consent rights.

² See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Broadcast Signal Carriage Issues, *Report and Order*, 8 FCC Rcd 2965, 3005 (para. 173) (1993) ("1993 Order").

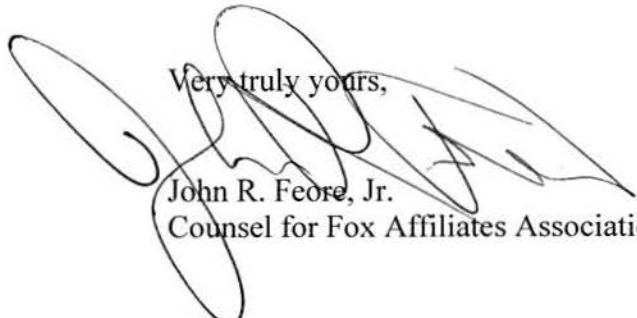
³ 47 U.S.C. § 325(b).

obtain retransmission consent to apply to “anyone engaged in retransmission by whatever means...”⁴ Congress contemplated that whatever compensation or other benefits that a broadcaster would obtain in exchange would help strengthen free local television service and the important public benefits that local stations provide. Any FCC interpretation of the statute in this case must not undermine these key Congressional purposes.

The Commission also must avoid creating a regime in which some video providers are required to obtain broadcasters’ retransmission consent and others are not. Broadcasters’ communications rights in their signals must be respected regardless of the transmission technology used by a video distributor. Any other result would devalue the communications right Congress created and lead to the type of asymmetrical regulation that inevitably leads to market imbalance and harm to consumers. Consumers are particularly at risk in this case because retransmission consent proceeds were designed to strengthen the local service provided by over-the-air broadcasters. Permitting some video distributors to avoid the requirement of obtaining consent and compensating broadcasters would deplete broadcasters’ revenues and thereby harm local service. Worse yet, creating a loophole that allows some providers to avoid retransmission consent will encourage all video providers subject to the retransmission consent regime to reconfigure their distribution networks to resemble providers that are immune to the requirements of Section 325(b). This would create a downward spiral in retransmission consent revenues and local television broadcast service. This would utterly subvert Congress’s carefully crafted retransmission consent regime.

Congress entrusted the Commission with the authority and the responsibility to implement Section 325(b) to further its goals of strengthening local television broadcast service. The only way the Commission can satisfy its duties under the statute is to ensure that all video programming distributors seeking to retransmit broadcasters’ signal first obtain each station’s consent. The Commission must ensure that whatever definitions it adopts for the terms “MVPD” and “Channel,” the resulting regulatory framework respects Congress’s intention for retransmission consent.

Very truly yours,


John R. Feore, Jr.
Counsel for Fox Affiliates Association